**UNIVERSITY OF ESSEX** **DISSERTATION**

**SCHOOL OF LAW**

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| **LLM IN: INTERNATIONAL HUMAN RIGHTS** |
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| **DISSERTATION TITLE: HATE SPEECH IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: An Article 10 and Article 17 Dichotomy**<br>**----------**<br>**----------**<br>**----------** |

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Supervisor: Dr. Clotilde Pegorier

DISSERTATION

# HATE SPEECH IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: An Article 10 and Article 17 Dichotomy

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**TABLE OF CONTENTS**

## 1.INTRODUCTION

As long as the thoughts of individuals in society do not turn into words, they do not express any importance in terms of legal science. However, the statements of individuals, especially their harmful and hateful discourses which can play a role in increasing violence in society, fall within the field of legal science. Such statements sow a seed or an idea in the mind of someone who already has negative views or dangerous thoughts against specific groups or individuals. It harms us on an interpersonal, community and societal level. Hate speeches are normalized and accepted unless they have struggled. Thus, it is vital to combat hate speech.

Despite the importance of combating hate speech, the question of how to deal with is difficult to answer. Because hate speech is a controversial social phenomenon. There are many debatable areas regarding hate speech such as, which expressions constitute hate speech, the definition of it and whether we should restrict it. These difficulties make the hate speech one of the most complex issues in the field of freedom of expression. Although being a fundamental human right and playing a vital role in realizing other rights, freedom of expression can be abused and in such situations, it can transfer into an opposite phenomenon. For instance, if an individual or group expresses ideas on superiority of a certain race, religion or nation, intending to humiliate all those not belonging to „their“ group, freedom of expression transfers into a hate speech. However, determining when an expression is permissible and within the scope of freedom of expression is a very sensitive matter.

In this context, it will be interesting to examine the approach of the European Court of Human Rights (European Court, ECtHR), which is responsible for supervising the enforcement of the European Convention of Human Rights (Convention, ECHR), which requires the signatory states to guarantee freedom of expression. The European Court, in its decisions, strongly condemns expressions containing hatred of a certain category of citizens and tries to create standards between hate speech as a negative phenomenon and freedom of expression. The Court uses two approaches while dealing with this issue; the broader approach of exclusion from the protection of the Convention provided for by Article 17, so-called abuse clause, and the narrower approach of restrictions on protection provided for by Article 10, paragraph 2, of the Convention. In its Article 10 approach, the European Court strikes a balance between the right to freedom of expression in Article 10/1 and the interests in Article 10/2. On the other hand, in its Article 17 approach, there is not a need for such a balancing process. Speech is mostly limited only because of its content.

As a first step, this study will elaborate on the definitional and contextual arena of hate speech to provide a better understanding of the controversies of this phenomenon and the underpinnings of the ECtHR approach to it. Then it will proceed to look at the ECtHR case law and seeks to systematize the Court's case-law in the hate speech area. In particular, it will analyse the application of Article 10 and Article 17 of the Convention in hate speech cases. The final aim is to reveal what are the specific controversies and shortcomings of the ECtHR jurisprudence relating to hate speech are, and what the court's ideal approach to these issues might be.

## CHAPTER 1

## CONCEPT OF HATE SPEECH

### 1. What is Hate Speech

Hate speech is a kind of insult to a person because of his/her ethnic, race, religious or other groups to which he/she is a member of it. The aim of hate speech is generally to condemn the individual or group, or to express anger, hatred towards them.[1] Hate speech as a concept, refers to the entire spectrum of negative discourse, ranging from expressing, promoting or encouraging hate to abusive expression and denigration, and to extreme forms of prejudice, stereotypes and bias.[2] Practically, all racist, xenophobic, homophobic (and expressions related to other tendencies) discourses that include humiliation of identities can be classified as hate speech.[3] Hate speech may be considered in various axes. It might be expressed orally, in writing or via the Internet.[4] It might be direct; for instance, "Niggers go home. Making monkey noises and chanting racist slogans at soccer matches.", "Serve your country, burn down a mosque."[5], "African, go back [to] eating bananas, monkey!" [6] are examples of direct hate speech. But it might also be indirect or veiled such as public use of insulting symbols, burning crosses, burning flags etc.[7]

As can be inferred from the above-mentioned hate speech examples, hate speech causes harm to both society and individuals. It affects victims psychologically and emotionally in a negative manner. Victims feel humiliated, isolated, self-hatred and self-doubt.[8] Nicholas Wolfson suggests that "such speech degrades the objects of abuse, silences them through fear, does them psychological damage and creates a smarmy and nauseating culture that harms women and minorities".[9]

Waldron notes that hate speech abuses vulnerable persons and breaks their sense of self. He mentions that it is both an object and a doing which has devastating effects on individuals and society. Hate speech represents violence by denying persons' dignity and reputation. It makes people feel insecure physically, psychologically and economically.[10] It also makes the victim groups fearful, angry and suspicious towards other groups. This divides

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[1] Elena Mihajlova, Jasna Bacovska, Tome Shekerdjiev, Freedom of Expression and Hate Speech (2013) 24
[2] Ibid 25
[3] Ibid 24
[4] Richard Delgado and Jean Stefancic, Understandıng Words That Wound (2004) 13
[5] Bhikhu Parekh, Is There a Case for Banning Hate Speech?, *Public Policy Research*, Vol. 12 Issue 4 (2006) 215
[6] Hate Crime and Hate Speech in Europe: Comprehensive Analysis of International Law Principles, EU-wide Study and National Assessments: Words are Weapons, available at; https://sosracismo.eu/wp-content/uploads/2016/07/Hate-Crime-and-Hate-Speech-in-Europe.-Comprehensive-Analysis-of-International-Law-Principles-EU-wide-Study-and-National-Assessments.pdf
[7] Mihajlova, Bacovska, Shekerdjiev ( n 1) 25
[8] Ibid 33
[9] Nıcholas Wolfson, Hate Speech, Sex Speech, Free Speech (1997) 2
[10] Karen Zivi, Doing Things With Hate Speech,(Understanding and regulating hate speech: A symposium on Jeremy Waldron's The Harm in Hate Speech) *Contemporary Political Theory Vol. 13(*2012) 95

society and reduces the quality of life of it.[11] In addition, this divisiveness harms equal and healthy participation of everyone to the democratic processes and this makes the society fragile.[12]

Despite these so many harmful effects, statistics demonstrate that hate speech has been increasing in Europe. For example, the European Union's Fundamental Rights Agency surveyed on experiences and perceptions of anti-Semitism in Europe in December 2018. Accordingly, 89% of Jews living in European countries feel anti-Semitism has increased in their country over the past decade. About half of the respondents mentioned that they are worried about being insulted or harassed in public because of being Jewish and more than a third mentioned their fear of being physically attacked. Moreover, Anti-Semitic crimes, which include hate speech, increased by 20%, according to government data in Germany in 2018. A recent report by France's National Human Rights Advisory Committee found that, in 2018, anti-Semitic acts in France rose more than 70% compared to the previous year.[13]

Although its great negative influence on both individuals and society, and its remarkable increase in recent years, there are still certain controversies in this area. One of the most important of these is that there is still no universal and generally accepted definition of hate speech.[14]

## 2. Attempts To Define Hate Speech

There have been academic and legal attempts to define hate speech. As a legal attempt to define "hate speech", the Council of Europe's Committee of Ministers" in its Recommendation 97(20), defined it as follows: "the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[15]

The Fundamental Rights Agency of the European Union ("FRA) attempted to define "hate speech," expressed, "Hate speech' refers to the incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic…"[16]

United Nations in its strategy and plan of action on hate speech defines hate speech as; "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of

[11] Mihajlova, Bacovska, Shekerdjiev (n 1) 33
[12] Önder Bakırcıoğlu, Freedom of Expression and Hate Speech, *Tulsa Journal of Comparative and International Law*, Volume 16 Issue 1 (2008) 5
[13] https://www.hrw.org/news/2019/06/04/alarming-rise-anti-semitism-europe, accessed 20.07.2019
[14] Anne Weber, Manual On Hate Speech (2009) 9
[15] Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe to member states on "Hate Speech"
[16] European Union Agency for Fundamental Rights, Hate Speech and Hate Crimes against lgbt persons 1 (2009),available athttp://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-hate-speech-crimeEN.pdf.

who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor."[17]

Although the term "hate speech" is found in the case-law of ECtHR, the Court has never given a precise definition of hate speech. The Court, in some of its judgments, simply refers to "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)."[18]

Instead of a clear definition, UN Human Rights Council gave some formulations such as; 'intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief', or 'the spread of discrimination and prejudice,' or 'incitement of hatred'.[19]

Academics, on the other hand, define it for a range of different ends. They often shape their definitions in line with their specific motivations. Some call for legal sanctions and tries to guide legislators and courts, some do not seek to make hate speech illegal and seeks only to understand the phenomenon, some are in between.[20] Richard Delgado, for example, mentions that, for a discourse to be a racial hate discourse, there are conditions that the complainant should prove. Accordingly;" Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult."[21]

Mari J. Matsuda mentions about three identification criteria for racist hate speech: "1) the message is "of racial inferiority; 2) the message is "directed against a historically oppressed group; 3) the message is "prosecutorial, hateful, and degrading."[22]

Matsuda's approach seems clearer than Delgado's because it tries to reveal the elements of hate speech more concretely. According to Matsuda, the speech must "deny the personhood of target group members," and treat all persons in this group as "alike and inferior." Also, the victim can only be the historically oppressed groups. Finally, the speech must be harmful.[23]

To sum, as it can be seen from the variety of definitions, the term hate speech has remained controversial. The lack of a consensus on the definition of hate speech makes it difficult to determine when an expression constitutes hate speech. When a law is vague, we

[17]United Nations Strategy and Plan of Action on Hate Speech ( May 2019) available at: https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf

[18] Weber ( n 14) 9

[19] Clotilde Pegorier, Speech and Harm: Genocide Denial, Hate Speech and Freedom of Expression, *International Criminal Law Review*, 18 (2018) 97-126, 111

[20]Andrew F Sellars, Defining Hate Speech (December 8,2016) 16 Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882244

[21] Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.–C.L. L. Rev. 133 (1982) 179

[22] Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, *87 Michigan Law Review* Vol.87 (1989) 2357

[23] Sellars ( n 20) 16

cannot know what utterances and actions to avoid in advance. This gives too much power to courts. Because of this, hate speech must be defined very carefully and clearly.[24] The lack of universally accepted criteria for the determination of hate speech might be remedied by the further development of case law at the national and international level.[25]

## 3. Banning Hate Speech: Free Speech Versus Hate Speech

Another debatable area related to hate speech is whether hate speech should be banned. There are some reasons why it should. Such a law provides assurance not only to the victim group but to all members of society. The law legitimizes the political community in the targeted group's eyes and gets the right to its loyalty. It also gives clear messages to individuals related to an acceptable way of talking about and treating other individuals or groups. In addition, once a climate of hatred and violence against certain groups spreads and this damages the relationship between different groups, it also harms the public support to the law. Prohibiting hate speech has a significant impact on preventing political mobilization of hostility against certain groups.[26] In addition, there is a consensus on eliminating racism, bigotry, and discrimination in all its forms that encourage hate speech and hate crimes.[27] However, any valid solution to eliminate hate speech must take into consideration the delicate balance between free speech and other competing values (such as non-discrimination and equality) in each case.[28]

Free speech is of vital importance for democratic societies. It is also a basic right for individuals that enables them to create and improve their opinions, and thereby to realize themselves.[29] It is crucial for democratic societies and it is of vital importance for the enjoyment of many other freedoms.[30] By exercising this right we can decide who we are, to speak our minds, get information, vote, elect the government and question them, and influence our environment so that we can rule our lives.[31] Nevertheless, freedom of expression is not an absolute right. It may be subject to limitations.[32] To acknowledge the possibility that there may be circumstances in which other benefits outweigh freedom of expression is consistent with the high value of free speech in democratic societies.[33] However, there are other opinions and theories which oppose a legal ban on hate speech and put forward arguments on behalf of unlimited free speech.

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[24] Parekh ( n 5) 222
[25] Bakırcıoğlu ( n 12) 4
[26] Parekh ( n 5) 218
[27] Kevin Boyle, Overview of a Dilemma: Cencorship Versus Racism, in Sandra Coliver, Striking a Balance, Hate Speech, Freedom of Expression and Non-Discrimination (eds) (1992) 1
[28] Ibid 1
[29] *Handyside* v. *United Kingdom* [gc], 7 December 1976, European Court of Human Rights, no. 5493/72, Series A no. 24, para. 49, <hudoc.echr.coe.int/eng?i=001-57499> accessed 16 July 2019
[30] In a General Assembly resolution it was stated that "[freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.... G.A. Res. 59 (1), T **1,** U.N. Doc. A/RES/59/I (Dec. 14, 1946).
[31] Ricardo Restrepo, Democratic Freedom of Expression, *Open Journal of Philosophy* Vol.3, No.3 (2013) 380
[32] Mordechai Kremnitzer & Khaled Ghanayim, Incitement, Not Sedition, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY (David Kretzmer and Francine Kershman Hazan eds., Kluwer L. Int'l. 2000) 147
[33] Boyle (n 27) 1

Opponents of the legal ban on hate speech claim various reasons. The most commons are these: The first argument is that the free speech has a high value in democratic societies. It is like blood of democracy. In order to limit free speech, there must be very important reasons such as national security, public order, and vital state interests. The damage done by hate speech is relatively minor in its extent and intensity, and its toleration is a small price to pay in the larger interest of free speech and democracy. Although it has some merits, the argument is not convincing. Because we rightly proscribe obscenity, libel, defamation, public display of pornography and public advertisement of sexual service. Thus we live public life with certain norms. Social harmony, equality of treatment and the right to live one's life without harassment and intimidation are also significant values. Free speech does not automatically overweight these values and needs to be balanced.[34]

The second argument is that the evils can be defeated not by proscribing them. The best way is answering them with counter-arguments.[35] According to the 'marketplace of ideas' theory, free speech is significant because individuals can find the truth by the free competition of ideas.[36] In addition, the restriction of free speech and free discussion prevents individuals to reach better conclusions and blocks society. The collective nature of free speech facilitates the interchange of ideas and provides better conditions to find the truth and construct better ideas. [37] The rationale of this idea is mentioned by John Stuart Mill;

*First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.*

*Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.*

*Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.*[38]

Admittedly, in a democratic society, free expression and competition of ideas is necessary and important for achieving reality and making progress. However, it should be noted that in many societies there are inequalities and vulnerable groups, namely ethnic and religious minorities, immigrants or women, who do not have sufficient access to speech channels. [39] Competition between ideas can be fair only if the parties enjoy equal access to the market place, including the popular media and other agencies by which they are

[34] Parekh ( n 5) 219
[35] Ibid 219
[36] Philippe Yves Kuhn, Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights, *Human Rights Law Review* (2019) 122
[37] Nıhal Jayawıckrama, The Judıcıal Applıcatıon of Human Rıghts Law: Natıonal, Regıonal and Internatıonal Jurısprudence (2002) 666
[38] John Stuart Mill, On Liberty (2001) 50
[39] Bakırcıoglu ( n 12) 11

communicated and critically engage with each other. This is rarely the case. Moreover, if racist and xenophobic ideas become an integral part of a society's culture, they enjoy a built-in advantage over their opposites.[40] This might pave the way to the domination of the powerful in the marketplace of ideas. Therefore, states can limit speech without being too intrusive.[41]

The third argument is related to political participation. Meiklejohn, argues that freedom of expression applies to "those activities of thought and communication by which we govern." He mentions that; '"the people need free speech" because they have decided. . . to govern themselves rather than to be governed by others'.[42] According to this argument, hate speech has a chilling effect on public debate and discussion. Unlimited expression of opinions is a good thing and nothing should be done to put it at risk.[43] The argument depends on the slippery slope metaphor which claims once we start exceptions we cannot know where to stop.[44] However, if it was true, we could not make any exception to any principle. For example, we proscribe defamation of individuals without jeopardizing fair critical comment. Furthermore, in many societies which ban hate speech, public debate remains robust and does not show 'chilling effect'.[45]

Fourthly it is claimed that the discretion to judge the content of speech, to determine whether a speech, is good or bad, should be allowed or not, gives States an excessive power. It is also dangerous for individual liberties. This argument is flawed because it is wrong that the state has no right to judge the content of speech. States enjoy the right to restrict speech in the interest of other values which also have great importance. A ban on hate speech does not damage the moral neutrality of the state because it extends to all forms of hate speech irrespective of it has been expressed whether by a black or white racist. Moreover, a state which gives importance to human dignity, gender and race equality, or the spirit of free inquiry needs to act against forms of speech or behavior that defend and discredit them.[46]

The fifth argument asserts that human beings are autonomous and they can and should be trusted to see through hate speech.[47] According to the Scanlon who presents individual autonomy account, any theory of free speech must be valid for 'expression in general' rather than applying to any particular category of rights like political rights. He argues that the value of freedom of expression comes from its role in the improvement of individual autonomy and self-fulfilment. This account of free speech is very broad and vague.[48] In addition, although it is clear that government interference might affect individual autonomy and liberty, this

[40] Parekh ( n 5) 219
[41] Bakırcıoglu ( n 12) 11
[42] Bakırcıoglu ( n 12) 11
[43] Parekh ( n 5) 220
[44] Frederick Schauer, 'Slippery Slopes', *Harvard Law Review*, Vol. 99, 1985.
[45] Parekh ( n 5) 220
[46] Parekh ( n 5) 220
[47] Ibid 221
[48] Kuhn ( n 36) 121

account fails to consider the harms of hate speech and possible negative impacts of these, on the victim's self-fulfilment and personal development.[49]

The last argument is that suppressing speech might conceal the facts that society faces. Suppressing of expression leads to society's inability to see the facts and social problems. Over time, society becomes dissatisfied with its governors which is the actual basis of social unrest. Free speech and competition of ideas, therefore, is considered as "a method... of maintaining the precarious balance between healthy cleavage and necessary consensus."[50] This view, however, omits the devastating effects of hate speech, which might trigger the violent attacks against vulnerable groups and seriously harm the reputation of them. While it may strongly be argued that free speech can provide a better understanding of the prevailing problems in a society, the protection of human life, equality, non-discrimination should also be protected. This protection may sometimes require certain restrictions on freedom of expression.[51]

These theoretical debates in the context of free speech and hate speech have also manifested themselves in practice. The European Court of Human Rights and the US Supreme Court, which are the two most influential regional human rights mechanisms, have developed completely different approaches in hate speech cases.

**a. The U.S Approach to Hate Speech:**

In the United States, tolerating hate speech is seen as a price to pay to guarantee freedom of expression.[52] The First Amendment to the United States Constitution provides that "Congress shall make no law.., abridging the freedom of speech, or of the press **.....**"[53] The United States Supreme Court, through its decisions, has expanded the guarantees of freedom of expression which is adopted in the First Amendment.[54] In this context, Ronald Dworkin stated that: "The United States stands alone even among democracies, in the extraordinary degree to which its Constitution protects freedom of speech and of the press."[55] This belief mostly depends on the above mentioned "marketplace of ideas" theory.[56]

The United States protects nearly all forms of speech under the First Amendment, with only some narrow exceptions. The First Amendment guarantees a big amount of freedom of expression. It protects most speech –even profane or offensive- except in very

[49] Bakırcıoğlu ( n 12) 9
[50] Franklyn S. Haiman, Freedom of Speech (nat'l textbook co. 1979) 205
[51] Bakırcıoglu ( n 12) 12
[52] Ibid 14
[53] U.S. CONST. amend. I.
[54] Sionaidh Douglas-Scott, The Hatefulness of Protected Speech: A Comparison of the American and European Approaches, *William & Mary Bill of Rights Journal*, Volume 7 Issue 2 (1999) 309
[55] Ronald Dworkin, The Coming Battles over Free Speech, N.Y. REV. BOOKS (1992) 55.
[56] Bakırcıoglu ( n 12) 14

specific circumstances.[57] The United States has very few laws that prohibit hate speech compared to European countries such as France, Germany, Austria, and Poland. [58]

The high degree to which freedom of expression protected can be seen in the case-law of the Supreme Court. For example, in the well known American case of *Collin v. Smith*, the planned march of the Neo-Nazis to a suburb called Skokie was restricted. The Neo-Nazis had chosen the place precisely because a large number of Holocaust survivors were living there. According to the Court, the march was a protected speech. Thus the Court invalidated the anti-defamation law by which the national authorities sought to prevent the march. The Court found that the sort of expression of Neo-Nazis was the necessary price of liberty in America.[59]

Additionally in its R.A. V v. City of St. Paul case, the defendant R.A.V. was charged under the St.Paul Bias-Motivated Crime Ordinance because of the burning of a crudely made cross on the lawn of a black family that had moved into a formerly all white neighborhood. The Court did not approve the city regulation which criminalized placing a symbol on public or private property that aroused "anger, alarm [,] resentment..'. on the basis of race, colour, creed, religion, or gender." The Court decided that St. Paul's prohibition was not necessary in order to protect the rights of individuals who have historically been discriminated against. The Court found the ordinance unconstitutional and that the charge must be dismissed. According to the Court, the local law violated the free speech guarantee of the First Amendment because it "prohibited... speech solely on the basis of the subjects the speech addressed."[60]

The U.S Supreme Court currently excludes, from the protection of First Amendment, only three types of speech; obscenity, defamation and speech that creates "clear and present danger".[61] In its Chaplinsky v. New Hampshire case, the Court established the "fighting words" exception. Accordingly, words with little social value and that are likely to cause a breach of the peace are not protected under the First Amendment. In addition in *Brandenburg v. Ohio case*, the Court expressed that states can restrict speech that aims to produce "imminent lawless action" and is likely to produce such action.[62]

To sum, it can be seen that U.S Supreme Court provides protection for a wide range of speech in the scope of the First Amendment and restrict free speech only in exceptional situations.

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[57] Anne-Marie Beliveau, "Hate Speech Laws in the United States and the Council of Europe: The Fine Balance between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization through Social Media Sites." *Suffolk University Law Review*, vol. 51, no. 4 (2018) 569

[58] Ibid 569

[59] Douglas- Scott (n 54) 308

[60] Beliveau ( n 57) 571

[61] Roger Kiska, Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence, *25 Regent U. L. Rev.* 107, 152 (2012) 139

[62] Beliveau ( n 57) 570

### b. The European Court of Human Rights' Approach:

The ECHR is rooted in an understanding that is more favoured with balancing private and public interests, protecting the dignity and equality of all citizens and guaranteeing that the attributes of democratic government are preserved.[63] In the same vein, The European Court's approach to hate speech '"reflects the devotion of this Court to building standards and principles that are based on protecting the equality and dignity of all citizens through the application of the test of balancing private and public interests" [64]

Although the Convention does not contain a specific provision which clearly prohibits certain forms of speech which could be deemed as hate speech and legally limited as such,[65] in conformity with the above-mentioned counter-arguments to unlimited free speech theories, the CoE allows for the application of specific hate speech laws created after World War II and the Holocaust.[66] In most European States, inciting racial hatred is viewed as highly dangerous and punishable. A book which only questions the Holocaust can be evaluated in that context.[67]

According to the case-law of ECtHR, it is clear that expressions which can be insulting to a specific individual or group cannot be considered within the scope of freedom of expression. Thus, there is an obligation to avoid gratuitously offensive expressions which do not have any positive impact on any kind of public debate capable of furthering progress in human affairs.[68]

The European Court first used the term 'hate speech' without definition or explanation in its *Sürek v.Turkey (No.1), Sürek and Özdemir v. Turkey*, *Sürek v.Turkey (no.4)* and *Erdoğdu v.Turkey* cases. In these and afterwards cases the Court has understood 'hate speech' as all forms of expression which spread, promote, incite or justify hatred based on intolerance[69] and has not explicitly defined hate speech.[70]

The European Court uses two primary approaches while dealing with cases related to incitement to hatred;[71] one approach is the prohibition of abuse of rights, Article 17 of ECHR. Accordingly, the Court excludes the person from the protections of the Convention

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[63] Françoise Tulkens, When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights (7 July 2015) available at: http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/TULKENS_Francoise_Presentation_When_to_Say_is_To_Do_Freedom_of_Expression_and_Hate_Speech_in_the_Case_Law_of_the_ECtHR_October_2012.pdf

[64] Biljana Karovska-Andonovska, Creating Standards Against Hate Speech Through the Case-law of the European Court of Human Rights, *Balkan Social Science Review*, Vol. 8, (December 2016) 11

[65] Vesna Alaburic, Legal Concept of Hate Speech and Jurisprudence of the European Court of Human Rights, *Croatian Political Science Review*, Vol. 55, No. 4 (2018) 242

[66] Beliveau ( n 57) 566

[67] Erik Bleich, Freedom of Expression versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe, *Journal of Ethnic and Migration Studies*, (2013) 22

[68] Rorive, Isabelle. "What Can Be Done against Cyber Hate - Freedom of Speech versus Hate Speech in the Council of Europe." *Cardozo Journal of International and Comparative Law*, vol. 17, no. 3 (2009) 421

[69] Karovska-Andonovska ( n 64) 11

[70] Alaburic ( n 65) 251

[71] Beliveau ( n 57) 573

because the speech at issue counteracts the basic values of the Convention. The other approach is that the Court limits individual's freedom of expression[72] within the exceptional conditions provided for by Article 10, paragraph 2, of the Convention (this approach is applied where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention)".[73]

[72] *See* Council of Eur., European Court of Human Rights, factsheet-hate speech (2016) 1,avalilable at http://www.echr.coe.int/Documents/FSHatespeech ENG.pdf [https://perma.cc/273U-66UN]
[73] Karovska-Andonovska ( n 64) 11

## CHAPTER 2

## -APPLICATION OF ARTICLE 10 IN HATE SPEECH CASES

### 1. Freedom of expression under the ECHR

Freedom of expression has special importance among other rights which are granted in ECHR. Because it is one of the roots of democracy and it fosters democracy continuously. Without free debates and the freedom to express opinions, democracy cannot progress and exist.[74] The ECHR, as the most important human rights instrument for European Countries, in its Article 10, guarantees freedom of expression for everyone. It states:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [...]*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The significance of freedom of expression has been mentioned by the European Court in its judgment Handyside. The Court affirmed that "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man". The Court also gave the formula which is still used, that ""subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no "democratic society"[75]

### 2. Principles of Restricting Freedom of Expression

Although freedom of expression has a great value in democratic societies, it has to be limited if it encroaches upon other rights. The principles of restricting freedom of expression -limits of limitations- is mentioned in above-mentioned Article 10/2 of ECHR and can be found in the case law of ECtHR. Accordingly, a limitation must : (a) be provided by law, b) pursue one of the legitimate aims expressly and exhaustively enumerated in article 10/2, c) be necessary in a democratic society.

[74] Weber ( n 14) 19
[75] *Handyside* v. *United Kingdom* [gc] supra note 30

### a. The Principle of Legality:

A limitation on freedom of expression requires the principle of legality. It must be provided by law. The word of the law in the Convention does not only refer to the official activities of the legislature. It also includes case-law, Government and other regulations and the rules of international law. The significant point is the compliance of the rule with the two criteria which demonstrates the quality of law; the law's foreseeable and accessible character.[76]

According to the ECtHR, a law is accessible if it provides sufficient indicators to the citizens with regard to which legal rule is applicable in a concrete case. For example, the publication of the rules is an important element of accessibility.[77]

A law is foreseeable if it is formulated with adequate precision to make sure the individuals to regulate his conduct. It must be predictable and an individual must be able to foresee, to some extent that is reasonable in the circumstances, the consequences which an act may entail.[78]

According to the ECtHR domestic law should meet the clarity requirement. It must prevent arbitrary interferences by public authorities with the rights guaranteed by the Convention. The law in question must also be precise. These criteria which are determined in the case-law of ECtHR are crucial in terms of preventing arbitrary interference of national authorities to freedom of expression. Hate speech legislation, therefore, needs to be clear, foreseeable, precise and accessible in order to meet the criteria of prescription by law.[79]

### b. The Principle of Legitimacy

The second criterion of the analysis of interference is whether the interference pursues a legitimate aim. There are six legitimate aims in limiting freedom of expression which are exhaustively enumerated in paragraph 2 of Article 10. These are; a) Protection of national security, territorial integrity or public safety, b) Prevention of disorder or crime, c) Protection of health or morals, d)Protection of reputation or rights of others, e) Preventing of disclosure of information received in confidence, and f) Maintaining the authority and impartiality of the judiciary.[80]

In its *Otto-Preminger v. Austria* case, for example, the Australian authorities' seizure of a film in a highly Catolig part of the country, was upheld by the Court. Because the film

[76] Dragoş Cucereanu, Aspects of Regulating Freedom of Expression on the Internet (2008) 15
[77] *Silver and Others v. the United Kingdom*, 25 March 1983,European Court of Human Rights, Series A no.61, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-57577"]}, accessed 29 July 2019
[78] Ibid. par.88
[79] Kiska ( n 61) 124
[80] Cucereanu ( n 76) 16

was extremely offensive to the Catholics. The Court assessed that the protection of the reputation or rights of others as a legitimate aim in that case.[81]

### c. The Principle of Democratic Necessity

In addition to legitimacy and legality, the restriction must be necessary in a democratic society, in order to be an acceptable limitation of freedom of expression. The necessity in a democratic society is the main test which the Court applies in such cases. [82]

There are three criteria while assessing the necessity of the measure. These are; a) existence of a pressing social need, b) advancement of 'relevant and sufficient reasons for the limitation, c) proportionality of the measure.[83] The Court explained whether these criteria are met in its Zana v. Turkey case and stated that;

*"it must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient." In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts."*[84]

Some authors argue that, of these three criteria, the Court, in fact, only applies the proportionality while assessing necessity, in its case-law. In any event, it is clear that the third criterion has been analyzed by the Court more often and in a detailed way.[85] According to the Court, proportionality is the achievement of a fair balance between conflicting interests.[86] Even where the Court considers the existence of hate speech, it always reviews the proportionality of the measure. [87]

In its *Sürek v Turkey* case, for example, the applicant was the owner of a political weekly journal which published two readers' letter condemning military actions of the Turkish authorities against Kurdish population. Turkish domestic courts convicted the applicant following the Turkish Criminal Code with the accusation of "disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people". The Court stated that "the impugned letters amounted to an appeal to bloody revenge and that one of them had identified persons involved in military operations by name, exposing them to the possible risk of physical violence". The court noted the presence of hate

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[81] *Otto Preminger Institute* v. *Austria*, 20 September 1994, European Court of Human Rights, no. 13470/87, Series A no. 295-A, para 49, <http://hudoc.echr.coe.int/eng?i=001-57897>, accessed 17 July 2019.
[82] Cucereanu ( n 76) 16
[83] Ibid 17
[84] *Zana v. Turkey*, 25 November 1997, European Court of Human Rights, 1997-VII Eur. Ct. H.R. 2533**,** 2548, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58115%22]}, accessed 20 July 2019
[85] Cucerenau (n 76) 17
[86] Kiska ( n 61 ) 128
[87]*Sürek* v. *Turkey (No.1)* [gc], 8 July 1999, European Court of Human Rights, no. 26682/95, echr 1999-iv, para. 62, <hudoc.echr.coe.int/eng?i=001-58279>, accessed 16 July 2019.

speech and the glorification of violence. After determined the hate speech the Court also examined the proportionality of the measure and found the measure taken by authorities proportionate to the legitimate aim pursued.[88]

The Court takes into account various factors while assessing proportionality. For example, in its *Incal v. Turkey* case, the existence of alternative means was examined. In this case, a demand for authorization was submitted to the authorities before the distribution of the impugned leaflets. According to the Court, the authorities could have required changes to the leaflet before having recourse to a criminal sanction. Failing this, the Court noted the radical nature of the impugned interference and points out that 'its preventive aspect by itself raises problems under Article 10.'[89]

The Court also examines the nature of the sanctions while assessing proportionality. In its *Erbakan v. Turkey* case, the Court found the penalties very harsh for a well-known politician. The penalty for the applicant was one year imprisonment and being banned from exercising several civil and political rights. The Court decided that freedom of expression of the applicant had been violated.[90]

The Court, while examining whether these criteria regarding limitations of freedom of expression is met in a concrete case, allows a limited "margin of appreciation" to the national authorities.[91]

### 3. The Role of Margin of Appreciation Doctrine in Article 10:

According to Takahashi, "margin of appreciation" refers to the latitude which a government is entitled to assessing factual situations and in applying the rules defined in international human rights treaties.[92] The doctrine has been developed to find a balance between national perspectives of human rights and the uniform standards of Convention values. The doctrine requires to consider the social, cultural and economic conditions of each society.[93]

The court has developed this doctrine, taking into account the principle of subsidiarity of the Convention's human rights protection system.[94] In its Handyside judgment, the Court noted that States have a margin of appreciation while assessing the necessity of interference

[88] Mario Oetheimer, "Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law." Cardozo Journal of International and Comparative Law, vol. 17, no. 3 (2009) 440
[89] *Incal* v. *Turkey*, 9 June 1998, European Court of Human Rights, no. 22678/93, echr 1998-iv, para. 58, <hudoc.echr.coe.int/eng?i=001-58197>, accessed 17 July 2019.
[90] Erbakan v. Turkey, 6 July 2006, European Court of Human Rights, no. 59405/00, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-121147%22]}, accessed 18 July 2019.
[91] Weber (n 14) 31
[92] Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurispundance of the ECHR (2002) 4
[93] Ibid 4
[94] Weber ( n 14) 32

because a national judge is in a more advantageous position to assess the existence of pressing social needs than an international judge.[95]

For instance, in its *Simunic v.Croatia* case which was related to ethnic hatred, the Court allowed certain discretion to national authorities. In this case, the applicant was a footballer and was convicted because of addressing messages which expressed hatred based on race, nationality, and faith, to spectators of a football match. The applicant claimed that his freedom of expression had been violated. The Court considered the modest nature of the fine imposed and the context in which he had shouted the impugned phrase. According to the court, the national authorities had established a fair balance between freedom of expression and society's interests in promoting tolerance and mutual respect at sports and acted within the margin of appreciation.[96]

### 4. Elements Taken into Account by the Court in Hate Speech Cases:

The court considers the interference "in the light of the case as a whole" when it encounters a restriction on freedom of expression in a case before it. Thus the decision of the court is based on the special circumstances of the case and there is not only one factor which determines what is allowed and what is not. There are several elements which are assessed on a case by case basis.[97]

The first criterion used by the Court is the purpose pursued by the applicant. However, it is a delicate and difficult issue to determine an individual's intent to spread hatred against a certain group. Because of that, the Court refers to the content and context of the expressions in which they are disseminated.[98]

#### a. The purpose pursued by the applicant:

The intent lay behind the hate speech expressions is to incite, promote or justify hatred against the members of certain groups (racial, religious or ethnic group, LGBT community, etc.).[99] The main issue is to determine whether the applicant intended to spread racist ideas and opinions through hate speech or whether he/she intended to inform the public on issues of general interest. The answer to this question determines whether or not an expression is shocking and offensive, but falls within the scope of Article 10.[100]

In its *Jersild v Denmark* case the Court found that; the purpose of the applicant, who was convicted for the broadcasting of racist statements, had been to expose "specific aspects of a matter that already then was of great public concern." Therefore the Court considered that "taken as a whole, the feature could not objectively have appeared to have as its purpose

[95] Ronald St. J. Macdonald, "The Margin of Appreciation" in Macdonald, Matscher, and Petzold (eds.) The European System for the Protection of Human Rights (1993) 88

[96] *Simunic v. Croatia*, 22 January 2019, European Court of Human Rights, no.20373/17, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-189769%22]}, accessed 20 July 2019.

[97] Weber (n 14) 33

[98] Ibid 33

[99] Mihajlova, Bacovska, Shekerdjiev ( n1) 26

[100] Weber (n 14) 33

the propagation of racist views and ideas".[101] In this decision, the Court found a violation of freedom of expression because according to the Court the applicant had no racist intention.[102]

In its *Garaudy v. France* decision, the Court examined incitement to racial hatred in the scope of Article 10/2. The Court emphasized that criticism of the State of Israel or any other State clearly falls within an individual's freedom of expression. However, according to the Court, the applicant's intent was not such criticism. His intent was in fact pursuing a racist aim.[103]

In above-mentioned decisions the Court attempted to clarify the purpose of the applicant about whether the applicant tried to inform the public on a public interest matter. If so the Court finds the interference is not necessary in a democratic society. Conversely, if the expressions' aim is incitement to hatred and violence, the Court allows national authorities a wider margin of appreciation while assessing the need for an interference with the exercise of freedom of expression.[104] For instance in its *Halis Doğan v Turkey* case, the Court pointed out that the newspaper article can be regarded as incitement to violence. The Court stated" "the comments expressed in the text stirred up primal instincts and reinforced already anchored prejudices, that expressed themselves with a deadly violence". The Court considered the margin of appreciation of the national authorities and found the interference proportionate to the legitimate aim pursued.[105]

**b. Content of the expression:**

Content means, "the subject or ideas contained in something written, said, created, or represented"[106]. The Court examines speech or other contents (written text, drawing, cartoon etc.) by which a person has expressed his views while deciding on a concrete case.[107] For example, it gives specific importance to the truthfulness of expression in question. Thus it distinguishes between issues that "are part of an ongoing debate among historians" and "clearly established historical facts."[108] Denying the clearly established historical fact of the Holocaust was not protected in the scope of Article 10. According to the Court, such a denial has an aim which is prohibited under Article 17 of the Convention. In its Garaudy decision, the court stated that; "there can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute

[101] *Jersild v Denmark*, 23rd September 1994, European Court of Human Rights,no. 15890/89, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57891%22]}, accessed 21 July 2019
[102] Weber ( n14) 33
[103] *Garaudy* v. *France*, 24 June 2003, European Court of Human Rights, no. 65831/01, echr 2003-ix, <hudoc.echr.coe.int/eng?i=001-23829>, accessed 21 July 2019
[104] Weber ( n 14) 34
[105] *Halis Doğan v. Turkey* (No. 3), 10 October 2006, European Court of Human Rights, no. 4119/02, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-121522%22]}, accessed 22 July 2019.
[106] https://dictionary.cambridge.org/dictionary/english/content, accessed 15 August 2019.
[107] Karovska-Andonovska ( n 64) 11
[108] *Lehideux and Isorni v. France [gc]*, 23 September 1998, European Court of Human Rights, no. 24662/94, echr 1998-vii, para. 47, <hudoc.echr.coe.int/eng?i=001-58245>, accessed 19 July 2019

historical research akin to a quest for the truth". The Court decided that the applicant cannot rely on the provisions of Article 10.[109]

**c. Context of the Expression:**

Context means "the situation within which somethingexists or happens, and that can help explain it".[110]The context of the expression plays an important role when reviewing the application of Article 10. Because the Court considers the contextual factors which encompass the expression such as the author, form, and impact of the speech while assessing the proportionality of the measure imposed on the applicant.[111]

The Court examines the context of the specific circumstances of every expression. The context is evaluated in terms of whether the expression was made in public debate as an exchange of conflicting views and opinions. The purpose to humiliate a certain group or to cause conflict and hostility are indicators of a speech which might constitute hate speech. In addition to this, the Court also takes into account the person's position who charged with hate speech.[112] In other words, the Court considers the applicant's function in society. An interference with a politician's or journalist's expression requires very meticulous review because of their roles in a democratic society.[113]

In its *Incal v.Turkey* case, for example, the Court took into consideration that the applicant was a politician and examined the specific circumstances of the case in a detailed way. In this case, the applicant was a member of the executive committee of the People's Labour Party. The executive committee decided to distribute leaflets criticizing the measures taken by the local authorities. National authorities convicted the applicant because of the racist content of the leaflets which incite hatred and hostility. The Court examined the specific circumstances of the case. The Court held that the expressions in the leaflets call for the Kurdish population to raise certain political demands and noted that although the reference to 'neighbourhood committees' seems inexplicit, if read in the context, these expressions cannot be seen as incitement to the use of violence, hostility or hatred. The Court stated, '…it cannot be ruled out that such a text may conceal objectives and intentions different from the ones it proclaims. However, as there is no evidence of any concrete action…'. The Court also noted that '… the circumstances of the present case are not comparable to those found in the Zana case (ibid.). Here the Court does not discern anything which would warrant the conclusion that Mr. Incal was in any way responsible for the problems of terrorism in Turkey…' The Court concluded that the applicant's conviction was disproportionate and thus unnecessary in a democratic society.[114]

A similar approach with politicians has been adopted with journalists and the press in general. In its *Jersild v Denmark* case, for example, the Court made an explicit distinction

[109] Weber ( n 14) 36
[110] https://dictionary.cambridge.org/dictionary/english/context, accessed 15 August 2019.
[111] Oetheimer ( n 88) 439
[112] Karovska-Andonovska ( n 64 )16
[113] Oetheimer ( n 88) 440
[114] *Incal v Turkey* supra note 91.

between expressions of the "Greenjackets" and the role of the journalist, who was the author of the documentary on them. According to the Court, "a significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme." Because of the applicant's journalist status, the Court took into account the principles related to the freedom of the press, allowing a limited margin of appreciation to national authorities and decided that freedom of expression of the applicant was violated. [115]

The impact of the expressions is taken into consideration by the Court as a contextual factor. In its *Karataş v. Turkey* case, the Court found that to express views through poetry, which by definition addresses a very small audience, "limited their potential impact on 'national security,' 'public order' or 'territorial integrity.'[116]

The Court also examines the circumstances in which the speech took place in hate speech cases. In the case of *Delfi AS v. Estonia,* the question was whether the internet news portal has a responsibility in terms of offensive and violent comments which constitutes hate speech. The applicant company had been liable by the domestic courts, for the comments of readers below the article. The Court found that the determination of domestic courts was proportionate to the legitimate aim pursued. Because the comments were highly offensive and amounted to an incitement to hatred and violence against individuals. The news portal failed to prevent the publication of these comments. The Court found no violation of Article 10.[117]

Another factor which the court takes into account is whether the author had a chance to correct the language he or she used. In its *Gündüz v Turkey* case, the Court emphasized that the applicant expressed his views on a lively public discussion. The applicant's statements were balanced by the intervention of other participants in the program and their views were expressed as part of the pluralistic debate. The Court concerning some expressions of the applicant which can be considered as insulting stated that; "the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public".[118]

To sum up, the European Court, when applied Article 10 to hate speech cases, takes into consideration the specific circumstances of every case and assesses these concrete situations in the light of above-mentioned criteria and elements. According to the Court; 'there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the

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[115] Weber ( n 14) 38

[116] *Karataş v. Turkey*, 08 July 1999, European Court of Human Rights, no. 23168/94, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58274%22]}, accessed 21 July 2019

[117] *Delfi AS v. Estonia*, ECtHR, 16 June 2015, European Court of Human Rights no. 64569/09, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22delfi%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-155105%22]}, accessed 23 July 2019

[118] *Gündüz v Turkey*, 4 December 2003, European Court of Human Rights no. 35071/97, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22g%C3%BCnd%C3%BCz%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61522%22]}, accessed 25 July 2019

Convention'.[119] However, this does not mean that interferences to freedom of expression do not need to meet the criteria stated in Article 10(2) ECHR, as pointed out by the Strasbourg Court. Indeed, even with regard to hate speech interferences are only justified if they are 'prescribed by law' and 'provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued'.[120] Application of the abuse clause is problematic in this respect.

[119] *Gündüz* v *Turkey*, supra note 118

[120] Hannes Cannie and Dirk Voorhoof, The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection*?, Netherlands Quarterly of Human Rights*, Vol. 29/1, 54–83 (2011) 67

## CHAPTER 3

## -APPLICATION OF ARTICLE 17 IN HATE SPEECH CASES

### 1. Creation and Rationale of the Abuse Clause:

The idea of the abuse clause in international human rights law emerged after a short time from World War II. The first regulation in this context was Article 30 of the Universal Declaration of Human Rights (UDHR). This article became the direct inspiration of Article 17 of the ECHR, a few years later, mentioning that;

*[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*

This article was the result of the political atmosphere that governed Europe during the drafting of the Convention. It constitutes the democracy's defense against communist and fascist threats which are seen enemies of freedom. The article aims to provide a legal weapon for democracy in order to prevent the repetition of the threats of the past totalitarian regimes of national-socialist, fascist and communist.[121] This understanding manifested itself in the European Commission of Human Rights' *Kommunistische Partei Deutschlands* vs *Germany* (*KPD* Case) case.[122] In this case, the Commission approved the proscribing of the Communist Party in Germany because the party had declared the goal of proletarian revolution and the dictatorship of the proletariat. The Commission applied Article 17. This prevented the Communist Party from relying on those Convention articles that guarantee freedom of opinion, expression and association. In later decisions related to incitement to racial discrimination and anti-Semitism, the Commission and the Court repeatedly emphasized that the aim of the abuse clause is 'to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention'.[123]

### 2. The Scope of Abuse Clause

For a clear understanding of the abuse clause, it should be noted that Article 17 cannot be invoked independently. It is always applied with a link to another Convention right as it can be understood from the wording of Article 17. There must be another right at stake which is deemed to be abused. In practice, its application is usually linked to the right to freedom of expression (Article 10 of ECHR).[124] The aim of Article 17 is to prevent the intentions which

[121] Ibid 57
[122] *Kommunistische Partei Deutschlands* vs *Germany*, 20 July 1957, European Commission on Human Rights (ECommHR), no. 250/57.
[123] Cannie, Vorhoof ( n 120) 57
[124] Ibid 58

target to benefit from the Convention's provisions on contrary to Convention's underlying values.[125]

The abuse clause can be applied both directly and indirectly. Above mentioned KPD case is an example of direct application of Article 17 which categorically excludes certain expressions from the protection of Article 10 (guillotine effect). In such cases, the complaints of the applicant are simply excluded from the scope of Article 10. If the Court uses Article 17 as an interpretative aid while evaluating the necessity of interference under Article 10/2 of ECHR, this means the indirect application of Article 17. [126]

After the KPD case, the Commission and the Court have applied Article 17 when confronted with totalitarian expressions. They repeatedly pointed out that 'National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the Convention'.[127] In *Kühnen v Germany* decision the Commission state that;

*As regards the circumstances of the present case the Commission again notes the detailed findings of the Frankfurt Regional Court according to which the publications at issue, by advocating national socialism, aimed at impairing the basic order of freedom and democracy (...) The Commission accordingly considered that the applicant's policy clearly contains elements of racial and religious discrimination (...) As a result, the Commission finds that the applicant is essentially seeking to use the freedom of information enshrined in Article 10 of the Convention as a basis for activities which are, as shown above, contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention.*[128]

Although this case still shows a clear link with totalitarianism, in latter cases the Commission seems to expand the scope of Article 17 to every act which is 'contrary to the text and spirit of the Convention'. Holocaust denial is most clearly seen in this broader scope. After Kühnen case, the Commission continuously applied Article 17 on Holocaust denial, which was consistently labeled as 'contrary to the text and spirit of the Convention'. The Court considered this kind of speech as 'discriminatory against Jewish people'[129], a form of racial and religious discrimination,[130] 'a continuation of the former discrimination against the Jewish people'[131], and even 'incitement to hatred against Jews'.[132] Furthermore, the Court acknowledged the denial as 'an insult to the Jewish people',[133] 'reproaching them with lying

[125] Oetheimer ( n 88) 429
[126] Cannie, Vorhoof ( n120) 58
[127] Ibid 59
[128] *Kühnen v Germany*, 12 May 1988, European Commission on Human Rights,no. 12194/86.
[129] *F.P. v. Germany*, 29 March 1993, European Commission on Human Rights, no. 19459/92.
[130] *Otto E.F.A. Remer v. Germany*, 6 September 1995, European Commission on Human Rights, no. 25096/94; *Honsik* v *Austria*, 18 October 1995, European Commission on Human Rights no. 25062/94; *Rebhandl* v *Austria*, 16 January 1996, European Commission on Human Rights no. 24398/94; and *D.I.* v *Germany*, 26 June 1996, European Commission on Human Rights no. 26551/95.
[131] *Udo Walendy* v *Germany*, 11 January 1995, European Commission on Human Rights no. 21128/92
[132] *Otto E.F.A. Remer* v *Germany*, *supra* note 130.
[133] *Udo Walendy* v *Germany*, *supra* note 131; and *D.I.* v *Germany*, *supra* note 130.

and extortion and thus portraying them as particularly abominable'[134] hence injuring their reputation and rights.[135] The Court in these cases, repeatedly found the applications related to freedom of expression manifestly ill-founded because of the clear necessity of the national limitations in a democratic society (indirect application of Article 17).[136]

After the abolition of the Commission, the European Court continued to point out the specific status of Holocaust denial and revisionist speech. In its *Witzsch v Germany* case which is a clear case of Holocaust denial, the Court applied Article 17 as an interpretative aid. The Court, in this case, decided that the interference was necessary in a democratic society under Article 10/2.[137] Later, in its *Garaudy v France* case the Court emphasized that negation or revision of Holocaust which is a clearly established historical fact, undermines Convention's underlying values that support the fight against racism and anti-Semitism.(the fight against anti-Semitism and racism here is clearly associated with the fundamental values protected by the Convention). As a result, Holocaust denial and crimes against humanity committed by the Nazis on the Jewish society entailed the direct application of Article 17.[138] The Court, in this case, stated that;

*'the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention. Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity.*'[139]

The European Court on some other occasions broadened the scope of Article 17. In some cases in which the applicants had been convicted for incitement to hatred against Jewish people, the Court applied Article 17 directly, although Holocaust denial or negationist expressions did not occur.[140] For example in its *Ivanov vs Russia* decision the applicant claimed that Jews were conspiring against the Russians and had a fascist ideology. The Court stated that ''(s)uch a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination'.[141] Moreover, the Court also applied Article 17 directly in a case which is clearly outside of the broad sphere of Anti-semitizm. In its *Norwood v the United Kingdom*

[134] *Otto E.F.A. Remer* vs *Germany*, *supra* note 130.
[135]*National Demokratische Partei Deutschlands, Bezirksverband München-Oberbayern* v. *Germany*, 29 November 1995, European Commission on Human Rights no. 25992/94.
[136]Cannie, Vorhoof (n 120) 60
[137] *Witzsch* v *Germany*, 20 April 1999, European Court of Human Rights, no. 41448/98, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-4868%22]}, accessed 27 July 2019
[138] Cannie, Vorhoof ( n 120) 61
[139] *Garaudy* vs *France*, supra note 103.
[140] Cannie, Vorhoof ( n 120) 62
[141] *Ivanov v Russia*, 20 February 2007, European Court of Human Rights, no. 35222/04
hudoc.echr.coe.int › webservices › content › pdf, accessed 5 August 2019.

case, a member of the British National Party had displayed a poster which includes the picture of Twin towers; with the words ' Islam out of Britain- Protect the British people' and with the symbols of a crescent and a star in prohibition sign. The Court in its decision stated that; *[s]uch a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.*[142] The Court, therefore, decided that the applicant's act does not enjoy the protection of Article 10 and it constitutes an act within the scope of Article 17.

To sum up, as explained above, the purpose of Article 17 was to protect democracies against new emerging totalitarian regimes. The analysis of the above-mentioned cases demonstrates that the Strasbourg organs have somewhat distanced itself from this purpose. The Convention organs have broadened the scope to all acts which are incompatible with the Convention's underlying values. In this context the Court clearly associated the fight against anti-semitizm and racism as such with the fundamental values protected by the Convention. Furthermore in its *Leroy v France* case, the Court's justification implied that in cases of racism, anti-semitizm and Islamophobia Article 17 can be applied.[143] The present case law of the Court demonstrates that this implication has been realized and that Article 17 has been applied more extensively in hate speech cases than in the past, as will be explained in the next section. This broadening of the abuse clause is not compatible with the original rationale and general purpose of Article 17.

### 3. Undesirable Effects of Article 17:

Before mentioning the undesirable effects of the abuse clause, the effects of indirect and direct application of Article 17 needs to be clarified. When the Court applies Article 17 the balancing procedure which Article 10 requires is completely absent. Because the decision mostly depends on the national authorities' assessment and exclusively relies on content examination. The expressions are simply excluded from the protection of Article 10. Because of the serious consequences of this approach, some supported the indirect application of the abuse clause. However, even if applied indirectly as an interpretative aid, it has similar undesirable effects.[144]

Some of the Commission's and the Court's admissibility decisions indirectly applied abuse clause while assessing the necessity of the interference. Thus, necessity was examined in compliance with the underlying values of the Convention. However, even in such cases, the Court attaches considerable importance to the findings of the national authorities (in some cases clearly on the findings 'as to the contents' of the applicant's publications). This causes a weighty application of Article 17[145] and almost always automatically leads to the result that

[142] ECtHR, *Norwood* v *the United Kingdom*, 16 November 2004, Application No. 23131/03 hudoc.echr.coe.int › app › conversion › pdf, accessed 5 August 2019
[143] Cannie, Vorhoof ( n 120) 63
[144] Ibid 67
[145] *Otto E.F.A. Remer v Germany*, supra note 131, *P. Marais* v *France*, 24 June 1996, European Commission on Human Rights, no. 31159/96, *Karl-August Hennicke* v *Germany*, 21 May 1997, European Commission on Human Rights, no. 34889/97.

the interference was necessary in a democratic society without efficiently balancing the case with the conflicting rights and interests, nor assessing it in its specific context with all factual and legally relevant elements. Formulations in such cases are far from responding to the specific circumstances of the case. [146] For example, in its *Remer vs Germany* decision, the Court stated that:

*(t)he public interests in the prevention of crime and disorder in the German population due to incitement to hatred against Jews, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews in the concentration camps under the Nazi regime, and the allegations of extortion.*[147]

Although such a statement may seem correct and consistent in itself, it appears that the case did not sufficiently refer to the case's own circumstances and special conditions concerning the alleged violation of freedom of expression. As a result, such reasoning is very similar to direct application of the abuse clause. When an action is accepted at the national level as a denial of the Holocaust or another activity or statement related to National Socialism, the application of Article 10 is automatically removed without any detailed examination of the whole circumstances of the case. In other words, although the assessment in such hate speech cases is formally made through Article 10, the strict conditions of Article 10 become dysfunctional with the indirect application of Article 17.[148]

**a) Effects on the Context Examination:**

The application of Article 17 requires the exclusion of certain expressions from the scope of free speech theory, taking into account the content of the expression and gives little attention to the context of expressions.[149] When the Court applied Article 17, the applicant cannot see that his/her expression judged in its specific context and all factual and legally relevant elements of the case is taken into consideration.[150] In that context, Keane points out the significance of the examination of context, gives the Jersild case example in which the applicant was a Danish journalist. He was convicted because of aiding some youngsters (the so-called *Greenjackets*) in making racist comments amounting to incitement to hatred, by broadcasting these persons' views. However, the programme was in the context of an important discussion on movements against immigration in Denmark. Although the Court seemed to apply Article 17 in the content of the application[151], the case was considered under Article 10(2). As a result, it was understood that Jersild 'did not make the objectionable

[146] Cannie, Vorhoof ( n 120) 68
[147] *Otto E.F.A. Remer* v *Germany*, *supra* note 131.
[148] Cannie, Vorhoof ( n120) 68
[149] Paolo Lobba, 'Holocaust Denial Before the European Court of Human Rights', 26(1) *European Journal of International Law* (2015) p. 242.
[150] Cannie, Vorhoof ( n120) 69
[151] See in this regard the Court's statement that '(t)here can be no doubt that the remarks (…) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10', *Jersild* v *Denmark*, *supra* note 101, para. 35.

statements himself, but assisted in their dissemination in his capacity of television journalist'.[152] Keane mentions about this case;

*The 'balancing process' and analysis of the element of proportionality would have been removed if the case had been examined under Article 17; indeed Jersild would not have passed the admissibility stage, and based on content alone, the Danish State would have been justified in prosecuting the journalist, irrespective of the context of the news piece*.[153]

Therefore, applying article 17 to hate speech cases damages the substantial safeguards on matters of freedom of expression and removes the requirement for detailed engagement with the contextual elements. Categorical exclusion of expression from the scope of Article 10 based on solely content, seems inappropriate to arrive a consistent legal position.[154]

**b) Disregarding Proportionality**:

In the Court's case law, the proportionality of the interference is rarely taken into account when Article 17 is applied.[155]In some cases, although the sentence was imprisonment, the Court completely ignored the proportionality test.[156] Disregarding proportionality in such cases is not compatible with the case-law of the Court which gives high importance to proportionality in article 10 cases. Disproportionality is a leading factor in the finding of a violation of freedom of expression. In some cases, although the Court acknowledges the pressing social need, sometimes even because of incitement to hatred, because of the severity of the sanction (for instance sentence of imprisonment)[157], the Court found the interference disproportionate and decided that the freedom of expression of the applicant violated.[158] For example, in its *Mehmet Cevher Ilhan v Turkey* decision, the Court found that the applicant's publication to be incitement to hatred and discrimination. The Court also considered the interference had a legitimate aim and responded to a pressing social need. However, the Court found the sentence of imprisonment which was more than 2 years

[152] *Jersild* vs *Denmark*, *supra* note 101
[153] David Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights', *Netherlands Quarterly of Human Rights*, Vol. 25, No. 4 (2007) 661
[154] Pegorier ( n 19) 124
[155] Arai, Y., 'Article 17', in: Van Dijk, P. and Van Hoof, L. (eds), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Antwerp, (2006) 1086
[156] *Otto E.F.A. Remer* vs *Germany*, *supra* note 131; *Honsik* vs *Austria*, *supra* note 130; and *Witzsch* vs *Germany*, *supra* note 137.
[157]*Skalka* v *Poland*, 27 May 2003, European Court of Human Rights, no. 43425/98 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61105%22]}; ECtHR, *Saday* vs *Turkey*, 30 March 2006, European Court of Human Rights, no. 32458/96, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-124658%22]}; *Lyashko* vs *Ukraine*, 10 Augustus 2006, European Court of Human Rights, no. 21040/02 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-76714%22]}; ECtHR, *Artun and Güvener* vs *Turkey*, 26 June 2007, European Court of Human Rights, no. 75510/01 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-72236%22]}; ECtHR, *Mahmudov and Agazade* vs *Azerbaijan*, 18 December 2008,European Court of Human Rights, no. 35877/04 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90356%22]}; and ECtHR, *Marchenko* vs *Ukraine*, 19 February 2009, European Court of Human Rights, no. 4063/04. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-91415%22]} accessed 7 August 2019
[158] Cannie, Vorhoof ( n 120) 71

disproportionate. Thus the Court decided that Article 10 has been violated.[159] It can be said that the application of abuse clause renders persons vulnerable to interference which is disproportionate to their freedom of expression.

### c) Structural Dangers:

Existing case-law of the European Court allows the States margin of appreciation in evaluating whether the measures taken is necessary in cases of hate speech. As explained in the previous chapter this margin is not limitless. However, the application of Article 17 removes the need for member States to justify the interference sufficiently and appropriately. It further diminishes the Court's role in guaranteeing a narrow understanding and convincing establishment of restrictions. Moreover, as a further step, States may wish to consider many actions within the broad and vague definition of being contrary to the underlying values of the convention.[160] According to Hare; this 'creates a serious risk that the state will (especially in times of particular religious or cultural sensitivity) be able to restrict or prohibit with impunity the expression of unpopular views by those who do not espouse mainstream liberal positions'[161].

## 4. Unnecessary for Protection of Democracy:

The Court justifies the application of abuse clause in responding to the acts related to National Socialism or inspired by this ideology, especially Holocaust denial. The Court points out in its decisions such activities are contrary to the Convention's underlying values and clearly dangerous for democracies. However, it is also true with regard to the expressions that (are believed to) incite violence or terrorism. Because these activities damage the foundations and values of democracy as well. These are also more likely to endanger citizens, seriously destroying their enjoyment of their rights and freedoms and lastly their right to human dignity that is at the basis of the Convention. The Court examines these kinds of expressions under Article 10, without referring to the abuse clause, which enables the Court to take all specific circumstances of the case into account.[162] Moreover, the Court examines the cases related to approval or glorification of terrorist acts under Article 10 without reference to Article 17.[163]

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[159] ECtHR, *Mehmet Cevher Ilhan* vs *Turkey*, 13 January 2009, European Court of Human Rights,no.15719/03,https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001142302%22]}10, accessed 10 August 2019

[160] Cannie, Vorhoof ( n 120) 72

[161] See Hare, I., 'Extreme Speech Under International and Regional Human Rights Standards', in: Hare, I. and Weinstein, J. (eds), *Extreme Speech and Democracy*, Oxford University Press, Oxford (2009) 79

[162] Cannie, Vorhoof ( n123) 73

[163] See, for example, the Court's admissibility decision in *Kern* v *Germany* (29 May 2007, Application No. 26870/04), in which it attached great interest to the fact that Kern, the local chairman of the right-wing extremist collaboration *Bündnis Rechts*, in a press release approved of the 9/11 terrorist attacks and that he assumed the existence of a 'Zionist oligarchy', as well as to the impact of those statements on the civil service. See also *Leroy* v *France, 2 October 2008, Application No. 36109/03,* with regard to a cartoon of the collapsing twin towers, accompanied by the text 'What we all dreamt of… Hamas did it'.

On the other hand, several cases related to hate speech and incitement to hatred in which abuse clause is not applied, demonstrate that the goals underlying abuse clause are likewise achieved under the speech-protective scope of Article 10.[164] Thus, it is rightly questionable that is it necessary to apply Article 17 in order to protect democracy.

[164] Cannie, Vorhoof ( n120) 73

## CHAPTER 4

## -ECtHR JURISPRUDENCE CONCERNING HATE SPEECH (CASE LAW EXAMPLES)

### 1) How the Court Deal With Various Forms of Hate Speech Cases

All applications related to hate speech have been submitted in the scope of Article 10 of the Convention. These applicants alleged violation of the rights to freedom of expression ensured in this article. Some of those applications have been declared admissible and considered by the Court. The Court assessed these applications on a case by case basis.[165]

### a) Xenophobia and Racial Discrimination:

In its *Glimmerveen and Hagenbeek v.The Netherlands* case which was related to xenophobia and racial discrimination, the Commission found that applicants were inspired by the overall aim to remove all non-white people from the Netherlands. The Commission applied Article 17 and the applicants' complaints under Article 10 were rejected because of being incompatible with the provisions of the Convention.[166]

In its *Feret v Belgium* case which was another example of xenophobia and racial discrimination the Court did not apply Article 17 and assessed the case under article 10. In this case, the applicant was the chairman of a party and a member of the Parliament. During the election campaign, some leaflets were distributed which include 'Stand up against the Islamification of Belgium' Stop the sham integration policy' and 'send non-European job-seekers home'. The applicant was convicted of incitement to racial hatred. He claimed that his freedom of expression has been violated. In the Court's view, the contents of the impugned leaflets did not justify the application of Article 17. However, the Court found no violation of Article 10 of Convention. The Court stated that the applicant's comments were conducive to rise feelings of distrust, hatred towards foreigners and thus explicitly amounted to incitement to hatred. The applicant's conviction had been justified in the interest of preventing disorder and protecting the right of members of the immigrant community.[167]

In another case related to xenophobia and racial discrimination, in *R.L.v. Switzerland* case, the Court used Article 17 as an interpretative aid. The case was about the seizure of two CDs and three musical records containing racist propaganda. The Court examined the applicant's complaint under Article 10. In this respect, implicitly relying on Article 17, the Court found that the materials were directed against the Convention's underlying values and the interference was "necessary in a democratic society".[168] Above mentioned *Jersild v.*

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[165] Alaburic ( n 65) 247

[166] *Glimmerveen and Hagenbeek* vs *the Netherlands*, European Commission on Human Rights, 11 October 1979, Application Nos 8348/78 and 8406/78.

[167] Feret v Belgium, 16 July 2009, European Court of Human Rights, no. 15615/07

[168] *R.L.v. Switzerland* 25 November 2003, European Court of Human Rights, no. 43874/98, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-23592%22]}, accessed 14 August 2019

*Denmark*[169] decision was also an example of Article 17 used as aid in interpretation, in the context of xenophobia.

**b. Hatred on ethnic grounds**

In its *W.P. and Others v. Poland* case which was related to anti-Semitism, the applicants were prevented from establishing an association. According to the Court 'the memorandum of association alleging the persecution of Poles by the Jewish minority and the existence of inequality between them could be seen as reviving anti-Semitism.' The Court applied article 17 and found the application inadmissible.[170] Above mentioned *Pavel Ivanov v. Russia* [171]decision was also an example of application of Article 17 in the context of anti-Semitizm.

In its *Balsytė-Lideikienė v. Lithuania* case which is another example of hatred on ethnic grounds and also anti-Semitism, the Court examined applicants' allegations under Article 10. In this case the applicant was issued an administrative warning because of his publication which refers to the Jews and Poles as the perpetrators of war crimes and genocide against the Lithuanians. Some copies of the publication which has not been sold were confiscated. The Court found no violation of Article 10, because the statements were inciting hatred against the Jews and Poles. In addition they were capable of causing serious concern for the national authorities. The Court did not raise the question of whether Article 17 could be applied.[172]

In its another case related to hatred on ethnic grounds, in *Stomakhin v Russia* case, the Court found that the statements of the applicant abuse the typical and characteristic of all Russians and Orthodox believers. The Court implicitly relied on Article 17 and observed that such broad attacks on ethnic and religious groups wer not compatible with the Convention's underlying values, especially tolerance, social peace and non-discrimination.[173]

**c. Homophobia:**

The Court in its *Vejdeland and others v Sweden* case which was related to homophobia applied Article 10 regarding the applicants' complaints. "This case concerned the applicants' conviction for distributing in an upper secondary school approximately 100 leaflets" (by leaving them in the school lockers). These leaflets were offensive to homosexuals. The leaflets contained "allegations that homosexuality was a 'deviant sexual proclivity', had 'a morally destructive effect on the substance of society' and was responsible for the development of HIV and AIDS... The Court found that these statements had constituted serious and prejudicial allegations, even if they had not been a direct call to

[169] Jersild v. Denmark supra note 101
[170] *W.P. and Others v. Poland*, 2 September 2004, European Court of Human Rights, no.42264/98, available at hudoc.echr.coe.int › webservices › content › pdf, accessed 15 August 2019
[171] *Ivanov* vs *Russia*,supra note 141
[172] *Balsytė-Lideikienė v. Lithuania,4 February 2009, European Court of Human Rights,* no.72596/01, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-89307%22]}, accessed 15 August 2019
[173] *Stomakhin v Russia*, 8 November 2008, European Court of Human Rights, no.52273/07, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-182731%22]}, accessed 16 August 2019

hateful acts. The Court stressed that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour. It concluded that there had been no violation of Article 10."[174]

In another case related to homophobia, in *Molnar v.Romania*, the Court used Article 17 as an interpretative aid. The applicant had convicted because of the distribution of posters which includes statements against the homosexual minority such as "Romania needs children, not homosexuals". According to the Court, by the reason of Article 17, found the applicant's act was not compatible with democracy and human rights and Article 10 was not violated.[175]

**d. Religious Hatred**

In its *Soulas and others v France* case which was related to Islamophobia, the applicants have been convicted because of the publication of a book which defends the idea of ethnic re-conquest war against Muslims who were overtaking Europe. The book presented the Muslim immigrants as criminally minded, abusing welfare benefits, perpetrating ritual rapes of European women and, generally, animated by Francophobia and anti-European racism. According to the Court, the French Court's assessment was sufficient that the content of the book and the terms used demonstrate the intention to give readers to a feeling of hostility against the Muslim communities as the main enemy in a future war. However, according to the Court, the statements in the book were not serious enough to require the application of Article 17. The Court applied article 10 to the applicant's allegations. Nevertheless, the Court allowed a wide margin of appreciation to national authorities taking into account the problem of social integration of immigrants and found no violation of Article 10. [176]

In its *Seurot v.France* case which was also related to Islamophobia, the Court applied Article 17 as an interpretative aid. The applicant was a school teacher who was convicted on account of an article which published in the school newspaper. In the article, there were statements such as 'unassimilable Muslim hordes", which had turned up, "building mosques everywhere" and imposing headscarves. The Court examined whether the applicant's claims should be removed from the protection of Article 10 by virtue of article 17. The Court decided that the application is manifestly ill-founded. According to the Court, the explicit racist content of the article was not consistent with the duties and responsibilities of teachers representing authority in the eyes of the students.[177]

In its abovementioned *Norwood v. United Kingdom*[178] decision which is another example of Islamophobia, the Court applied Article 17. The Court also applied Article 17 in its *Belkacem v. Belgium* case which was related to religious hatred towards non-muslims. The applicant convicted because of the videos on the YouTube platform in which he called to

[174] *Vejdeland and others v. Sweden*, 9 February 2012, European Court of Human Rights, no. 1813/07, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109046%22]}, accessed 16 August 2019
[175] *Molnar v.Romania*, 23 October 2012, European Court of Human Rights, no.16637/06.
[176] *Soulas and others v France*, 10 July 2008, European Court of Human Rights, no. 15948/03.
[177] *Seurot v.France*, 18 May 2004, European Court of Human Rights, no.57383/00.
[178] *Norwood vs the United Kingdom* supra note 142

overpower non-Muslims, teach them a lesson and fight them. According to the Court such a general and severe attack which stirs up violence and hatred towards all non-Muslim is incompatible with the values of tolerance, social peace and non-discrimination. By virtue of Article 17, the applicant's complaint was rejected as incompatible *ratione materiae* with the provisions of the Convention.[179]

### 2) An Article 10 or an Article 17 Approach:

In its Glimmerveen[180] decision, the Court directly applied article 17 related to racist hate speech, in its *Feret v Belgium* decision the applicant enjoyed the protection of Article 10[181], while in *R.L.v. Switzerland* [182], the Court applied Article 17 in conjunction with Article 10/2. These examples which are all related to xenophobia and racial discrimination demonstrates the debatable characteristic of the case law with regard to hate speech, in particular, article 10 and article 17 dichotomy.

There are different views related to the application of Article 10 and Article 17 in hate speech cases. One argument is that all forms of hate speech should be excluded from the protection of Article 10/1. Stanley Fish argues that; 'there is no such thing as free speech, that is, speech that has as its rationale nothing more than its own production'. In the context of hate speech, he emphasizes that defending hate speech in order to defend the principle of freedom of expression is a mistake. Accordingly;

*'The only way to fight hate speech or racist speech is to recognise it as the speech of your enemy and what you do in response to the speech of your enemy is not prescribe a medication for it but attempt to stamp it out.'*[183]

David Keane mentions that Fish's approach is similar to Article 17 approach to hate speech. In the preamble of ECHR, it can be seen that it is aligned against the sentiments stated by Glimmerveen and Hagenbeek, the Greenjackets and Kuhnen, as well as those who question historical facts related to Nazi atrocities and the Holocaust. Keane expresses that 'Perhaps all examples of such speech should simply be treated as anathema under Article 17, permitting both individuals and States to interfere in order to prevent its dissemination purely on the basis of content, and irrespective of the aim of the disseminator, as is currently the Court's practice in relation to Holocaust denial.'[184] Keane also questioned whether all hate speech should be treated equally, under Article 10, or under Article 17. However, he himself left this open-ended.[185]

Cannie and Voorhoof suggest that all hate speech without exception must be treated under the speech protective framework of Article 10 ECHR (with emphasis on the necessity

[179] *Belkacem v. Belgium*, 27 June 2017, European Court of Human Rights, no.34367/14.
[180] *Glimmerveen and Hagenbeek* vs *the Netherlands*, supra note 166
[181] Feret v. Belgium supra note 167
[182] *R.L.v. Switzerland* supra note 168
[183] Lowe, Peter and Jonson, Ann Marie, 'An Interview with Stanley Fish', *Australian Humanities Review*, February 1998, available at: www.lib.latrobe.edu.au/AHR/archive/Issue-February-1998/ fish.html, at page 9
[184] Keane (n 153) 658
[185] Ibid 661

test of Article 10/2). This is preferable in terms of both democratic and human rights perspective. Accordingly abuse clause should not have any impact in such cases. They call the Court to clearly formulate the reasons that support the conclusion with regard to the necessity of limiting the expression at issue, as to the specific circumstances of every case. Accordingly, all legally and factual elements of the concrete case must be taken into account, such as context, content, purpose, proportionality of the interference. They argue that abuse clause must be seen 'as a symbolic declaration in the light of which the whole Convention should be read and interpreted'[186]

There is another view which Clotilde Pegorier mentions related to genocide denial; accordingly, for the sake of consistency, the extension of the application of Article 17 to cases other than those involving denial of Holocaust is disadvantageous, given that it may to some extent prevent denial explanations from being fully integrated with all and legally relevant factors. On the other hand, applying Article 10 to all such speech would be a harsh approach that undermines the role of Article 17 in protecting democracy and human dignity. She suggests 'a more-mixed approach whereby Article 17 is applied not as a category tool of decision-making through its guillotine effect, but rather as an interpretative principle – within the framework supplied by Article 10.' Thus, Article 17 retains its role in the maintenance of democratic order and broader consideration of contextual factors is provided.[187]

Vesna Alaburic puts forward another argument. She also mentions the lack of consistency related to the application of Article 17 in the European Court's case-law and suggests that when hate speech is at stake, abuse clause should be applied only in very exceptional situations such as directly calling for or inciting violence against certain vulnerable groups. Accordingly, in all other hate speech cases, Article 10 should be applied.[188]

## CONCLUSION

Although the European Court has dealt with numerous hate speech cases to date, its jurisprudence regarding hate speech remains controversial and suffers from certain deficiencies. Firstly, applying Article 17 consistently in Holocaust denial cases raises the question of why it is not so strictly implemented in other hate speech cases and therefore gives a contradictory message.

In addition, as can be seen from the case law examples related to several forms of hate speech, the Court seems to expand the scope of Article 17. Even in the same form of hate speech, sometimes Article 10, sometimes Article 17 and sometimes Article 17 as an interpretative aid is applied by the Court. However, the interpretation and application of Article 17 and Article 10 in such cases do not provide clear criteria which determine which activities/acts fall within the scope of each article. The case law does not put forward sufficient indicators regarding how to draw the line between the application of Article 10 and

[186] Cannie, Vorhoof ( n120) 73
[187] Pegorier ( n 19) 125
[188] Alaburic ( n 66) 251

Article 17 in hate speech cases. This makes the Court's law unpredictable and to some extent open to arbitrariness.

Furthermore, the application of Article 17 in hate speech cases constitutes a potential threat to freedom of expression of individuals. When the Court applies Article 17 to hate speech cases, the significant elements of the case such as context of the expression, status and purpose of the applicant are not sufficiently examined. The Court mostly focuses on the content of the expression and mostly relies on the national authorities' assessments. Moreover, the proportionality of the measure which is of vital importance in order to ensure the right to freedom of expression is very rarely considered.

These controversies and negative effects of applying Article 17, the similar undesirable effects of the indirect application of Article 17 make the application of abuse clause in hate speech cases disadvantageous. Therefore, in order to make the Court's case-law consistent and predictable, in order to ensure that an applicant enjoys a detailed examination of his/her allegations, applying the speech protective framework of Article 10 to all hate speech cases seems the best solution.

Lastly, in addition to Article 10 and Article 17 dichotomy, another problematic area regarding hate speech case law is the lack of a clear definition of hate speech. This deficiency makes it difficult to distinguish hate speech from other hateful discourses. Absence of a coherent and comprehensive definition also makes the ECtHR case-law inconsistent, unpredictable and open to confusion. Moreover, the Court has a role to contribute to the harmonization of legislative and judicial practices in the human rights field among CoE member States. However, in this respect, it can be said that the Court case-law does not help enough to national authorities in establishing common legal standards related to hate speech.

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